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In the Supreme Court of the United States

OCTOBER TERM, 1990

RONALD ALLEN HARMELIN, PETITIONER

v.

STATE OF MICHIGAN

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a statutorily mandated sentence of life imprisonment without possibility of parole imposed on petitioner for possession of approximately 1.5 pounds of cocaine constitutes cruel and unusual punishment under the Eighth Amendment.

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INTEREST OF THE UNITED STATES

This case raises the question whether a mandatory sentence of life imprisonment without parole, imposed upon an individual convicted of possessing a large quantity of drugs, constitutes cruel and unusual punishment. A number of federal criminal statutes require that a convicted defendant be sentenced to a term of life imprisonment. See, *e.g.*, 18 U.S.C. 924(c)(1) (second conviction for use of certain firearms during crime of violence or drug trafficking offense); 21 U.S.C. 848(b) (principal leader of continuing drug enterprise with receipts of more than $10 million in a 12-month period); 21 U.S.C. 841(b)(1)(A)

(multiple violations of certain federal drug distribution crimes); 18 U.S.C. 1111 (first degree murder); 18 U.S.C. 1751 (presidential assassination); 18 U.S.C. 1651-1653, 1655, 1661 (piracy). In addition, the Senate has recently passed legislation extending the mandatory punishment of life imprisonment to other crimes.[1] The United States thus has a substantial interest in the constitutionality of mandatory sentences of life imprisonment.

As a result of the complete revision of the federal sentencing system in 1984 (see Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1976), federal sentences are no longer to be used for the purpose of rehabilitating the defendant (see 28 U.S.C. 994(k)), and parole has been eliminated in favor of determinate sentences. Petitioner and his amici attack both the absence of any rehabilitative rationale underlying the Michigan statute and the employment of mandatory sentencing provisions that reduce or narrowly confine the sentencing court's discretion. Because the federal sentencing system now uses "basically determinate" sentences (see *Mistretta* v. *United States*, 488 U.S. 361, 367 (1989)), and does not authorize sentencing for rehabilitative purposes, the United States has a special interest in those constitutional challenges to the judgment below.

Finally, the federal government is a participant in the nationwide effort to rid our society of the scourge of drug abuse and the violence that follows in its wake. The decision in this case may affect the extent to which the States

[1] The Senate bill, S. 1970, 101st Cong., 1st Sess. (1989) provides a mandatory penalty of life imprisonment for individuals who commit murder while serving a life sentence (§ 106); individuals convicted of certain drug offenses after having been previously convicted of those offenses or of crimes of violence (§ 305); and certain forms of aggravated kidnapping of children under age 18 (§ 1001). See 136 Cong. Rec. S10,184 (daily ed. July 20, 1990).

and the federal government can use severe punishments to deter drug trafficking and remove drug traffickers from the community. The United States has an interest in preserving for Congress and the state legislatures the constitutional authority to use heavy criminal penalties in an effort to achieve those ends.

STATEMENT

1. Petitioner was convicted of possessing more than 650 grams of a mixture containing cocaine. The cocaine was found after petitioner was stopped for a traffic offense. A search by the arresting officers produced ten small plastic bags containing small amounts of cocaine, some larger bags containing a total of 672.5 grams of undiluted cocaine, a gun (for which petitioner had a permit), a telephone pager, $2900 in cash, some marijuana, various pills, and some "drug paraphernalia." J.A. 3, 43-44. Petitioner also had a coded address book in his possession. Br. in Opp. at x.

2. Following his conviction, petitioner was sentenced to life imprisonment without parole under Michigan Comp. Laws Ann. § 333.7403(2)(a)(*i*) (West Supp. 1990).[2] That statute includes a graduated series of penalties for possession of mixtures containing certain drugs, including cocaine. *Id.* § 333.7214(a)(iv). For possession of 50 grams (about 2 ounces) or less of such a mixture, the penalty is up to four years' imprisonment and a fine of up to $25,000. For possession of 50-224 grams (up to about ½ pound), the penalty is between 10 and 20 years' imprisonment. For possession of 225-649 grams (up to about 1½ pounds), the penalty is between 20 and 30 years' imprison-

[2] Petitioner was also convicted of one count of possession of a firearm while commiting a felony (Mich. Comp. Laws Ann. § 750.227b (West Supp. 1990)). He received a two-year term of imprisonment on that count.

ment, and for possession of 650 grams or more, the penalty is life imprisonment without parole. *Id.* § 333.7403(2). See *id.* § 791.234(4) (providing for eligibility for parole after 10 years for persons sentenced to life imprisonment except for those convicted of either first degree murder or a "major controlled substance offense"); *id.* § 791.233b[1](b) (defining "major controlled substance offense" as, *inter alia*, a violation of § 333.7403).

After initially reversing petitioner's conviction on Fourth Amendment grounds, the Michigan Court of Appeals vacated its decision and affirmed petitioner's conviction and sentence. In dismissing petitioner's Eighth Amendment claim, the court simply cited without discussion an earlier decision, *People* v. *Harding*, 163 Mich. App. 298, 413 N.W.2d 777 (1987), vacated on other grounds, 430 Mich. 859, 420 N.W.2d 826 (1988), in which the court had upheld a similar sentence. The Michigan Supreme Court denied leave to appeal. J.A. 52.

3. On May 29, 1990, this Court granted the petition for a writ of certiorari, limiting the grant to Question III in the petition: "whether the mandatory sentence of life imprisonment without possibility of parole constitutes cruel and unusual punishment." 110 S. Ct. 2559; J.A. 53.

SUMMARY OF ARGUMENT

Petitioner's sentence of life imprisonment without parole, though severe, does not violate the Eighth Amendment. In the wake of this Court's decision in *Solem* v. *Helm*, 463 U.S. 277 (1983), which invalidated a life sentence without possibility of parole for a non-violent offense, federal and state courts without exception have held that sentences of life imprisonment may be imposed for serious or violent crimes – including drug-related crimes – committed by adults. Nothing about this case calls for a departure from the unbroken line of post-*Solem* authority.

Petitioner seeks to portray his offense as a non-violent, victimless crime of possession. That characterization is very misleading. The Michigan legislature could properly conclude that possession of 650 grams of cocaine does not constitute possession for personal use, but is clearly indicative of distribution. The Michigan legislature could also reasonably conclude that distribution of drugs is not a victimless crime, but is in fact equivalent to a violent assault both on the users of the drugs and on others who suffer the consequences of their use. Because the legislature could properly decide that the violence caused by unleashing such potent substances on society should be charged to the individuals responsible for their distribution, the sentence imposed on petitioner does not violate the Eighth Amendment.

The fact that Michigan provides a heavier penalty than any other State for a crime such as petitioner's does not render the Michigan statute unconstitutional. Some State will almost always be identifiable as the one that punishes a particular offense most severely; that fact alone does not warrant invalidating a sentence imposed under that State's law. In addition, legislatures mold the criminal law to address new threats to society, and current efforts to control the drug problem by increasing the penalties for drug violations are an important part of that process. In such an evolutionary system, Michigan's severe sanctions for drug-related crimes may well be *more* in accord with the public consensus concerning the gravity of drug-related offenses than are the laws of other jurisdictions that have not been recently amended to reflect changes in public attitudes toward drug trafficking.

Finally, the Eighth Amendment's history indicates particular concern with the unbridled discretion exercised when a judge or jury chooses an extremely severe punishment from a range of authorized options. That, indeed,

was the backdrop of *Solem* itself. This case does not represent a freakish or unintended exercise of sentencing authority by a single sentencing judge or jury. Instead, it reflects a considered decision of the Michigan legislature to apply a mandatory life sentence to all offenders in petitioner's position. That kind of legislative judgment is entitled to great deference by the courts and does not run afoul of the Eighth Amendment.

ARGUMENT

PETITIONER'S SENTENCE OF LIFE IMPRISONMENT WITHOUT POSSIBILITY OF PAROLE FOR POSSESSION OF A LARGE QUANTITY OF COCAINE IS CONSISTENT WITH THE EIGHTH AMENDMENT

In *Solem* v. *Helm*, 463 U.S. 277, 290 (1983), this Court held that "as a matter of principle * * * a criminal sentence must be proportionate to the crime for which the defendant has been convicted." Petitioner asserts that the state court's decision must be reversed because petitioner's sentence was imposed "without consideration of [petitioner's] individual characteristics" (Br. 5) and because the Michigan legislature erred in deciding that drug offenses, concededly "serious crimes" (Br. 7), require the harsh punishment mandated in the statute under which petitioner was sentenced.

1. Petitioner's argument misconceives this Court's holding in *Solem* and the principles governing the review of sentences of imprisonment under the Eighth Amendment. *Solem* did not usher in a reign of strict proportionality review of sentences of imprisonment; the Court held, rather, that a penalty that is "grossly" or "significantly" disproportionate to the crime violates the Eighth Amendment. 463 U.S. at 288, 303. Although the dissenting Justices in *Solem* disagreed vigorously with both the result and much of the analysis employed by the majority,

they agreed that the Eighth Amendment might well foreclose a sentence that is "grossly disproportionate" to the offense, that is, "where reasonable men cannot differ as to the inappropriateness of a punishment." See *Solem*, 463 U.S. at 311 n.3 (Burger, C.J., dissenting); see also *Rummel* v. *Estelle*, 445 U.S. 263, 274 n.11 (1980) ("a proportionality principle [might] come into play * * * if a legislature made overtime parking a felony punishable by life imprisonment"); *Hutto* v. *Davis*, 454 U.S. 370, 374 n.3 (1982) (per curiam) (same). Nonetheless, no member of this Court has suggested—in *Solem*, *Hutto*, *Rummel*, or any other case—that the Eighth Amendment requires individualized, discretionary sentencing in non-capital cases or a precise calibration of crime and punishment. To the contrary, the Court has embraced a set of principles that are fundamentally inconsistent with an exacting "proportionality review" of legislatively mandated penalties.

First, the Court has recognized the primary role of the legislature in determining the appropriate punishment for criminal behavior.[3] The Court noted in *Solem* that "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishment for crimes." 463 U.S. at 290; see also *id.* at 290 n.16.[4] In other Eighth Amendment cases as well, the Court

[3] Federal criminal law—both in defining crimes and in specifying permissible punishments—is entirely a creature of statute. See *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

[4] The statute at issue in *Solem* made the offender liable to a maximum—not a mandatory—sentence of life imprisonment without parole. See 463 U.S. at 281-282 n.6. Because "a lesser sentence * * * could have been entirely consistent with both the statute and the Eighth Amendment," the Court's decision "d[id] not question the legislature's judgment," but challenged the sentencing court's selection of a penalty at the top of the authorized sentencing range in light of the circumstances of that case. 463 U.S. at 299 n.26.

has expressed its "reluctance to review legislatively mandated terms of imprisonment." *Rummel* v. *Estelle*, 445 U.S. at 274; *Hutto* v. *Davis*, 454 U.S. at 374. Indeed, the Court has made clear that strict judicial review of statutorily mandated penalties would be unfaithful to the respect due to the legislature in classifying criminal behavior and determining to what extent the goals of retribution, deterrence, and rehabilitation ought to be served in meting out punishments. See *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, * * * these are peculiarly questions of legislative policy.").

Second, the Court in *Solem* took special note of "[t]he inherent nature of our federal system" that results, *inter alia*, in "a wide range of constitutional sentences." 463 U.S. at 291 n.17. To state the obvious, particular criminal behavior may affect different States in dramatically different ways, and particular theories of punishment may be effective in, and appeal to the citizens of, some States while lacking either effectiveness or popular support in others. This characteristic of our federal system has long been recognized by the Court. See *Graham* v. *West Virginia*, 224 U.S. 616 (1912); *Rummel* v. *Estelle*, 445 U.S. 263, 282 (1980); cf. *Weems* v. *United States*, 217 U.S. 349, 379 (1910); *id.* at 384-385 (White, J., dissenting). Similarly, some jurisdictions choose to emphasize the deterrent effect of the criminal law with respect to crimes that pose a particular threat to the social order, while in other States deterrence of the same conduct is seen as less important—or less realizable—and milder punishments are imposed based on the need for retribution or rehabilitation. Because given conduct may have different consequences in different States, and because the citizens and legislatures of different States may select different theories of punishment, precise judicial calibration of crimes and their penalties is neither desirable nor constitutionally mandated.

Third, the *Solem* Court held that "objective factors" should govern proportionality review of prison sentences. 463 U.S. at 290. As the plurality noted in *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977), "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." When judgments as to the disproportionality of crime and punishment are based on a particular theory of penology or a judge's personal assessment of the seriousness of a particular offense, those judgments cannot be said to be based on objective factors.

In light of these principles, it is clear that *Solem* did not introduce "a general rule of appellate review of sentences." 463 U.S. at 290 n.16. Rather, as the Court has made clear, the Eighth Amendment forbids only sentences of imprisonment that are "greatly disproportioned," *O'Neil* v. *Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting), "grossly disproportionate," *Coker* v. *Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion); *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977); *Solem*, 463 U.S. at 288; *id.* at 311 n.3 (dissenting opinion), or "significantly disproportionate to [the offender's] crime," *Solem*, 463 U.S. at 303. Consistent with those characterizations, the Court has observed that "a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate." *Id.* at 290 n.16. See also *id.* at 289-290 (quoting *Rummel*, 445 U.S. at 272, that "successful challenges to the proportionality of particular sentences [will be] exceedingly rare"). Sentences found to fall within very broad classes of acceptable punishments for categories of criminal behavior are constitutionally permissible.

2. *Solem* itself, and cases following it in the federal and state courts, have made clear that serious crimes, including drug trafficking, may constitutionally result in the imposition of sentences as severe as life imprisonment without parole, the penalty imposed on petitioner. In *Solem*, for example, the Court repeatedly noted that the offender's crime and his previous offenses were "among the less serious offenses" and "relatively minor." *Id.* at 296-297; see also *id.* at 300 ("so minor"). The Court explicitly contrasted such petty offenses with "very serious offenses" such as "a third offense of heroin dealing." *Id.* at 299. Moreover, the Court observed that "[n]o one suggests that [a statute providing for life imprisonment without parole] may not be applied constitutionally to fourth-time heroin dealers or other violent criminals." 463 U S. at 299 n.26.

The lower federal and state courts have had considerable experience since *Solem* in addressing Eighth Amendment challenges to prison sentences. Those courts have recognized that *Solem* does not require state legislatures to apportion crimes and punishments according to a single federal standard. Instead, avoiding reliance on their own subjective values, federal and state courts have without exception reached the conclusion that there is no "gross disproportionality" between a very lengthy prison sentence—with or without parole or clemency—and a serious or violent crime. Petitioner offers no reason for this Court to depart from that uniform line of judicial authority.

a. Although several federal criminal statutes permit or require the imposition of life imprisonment without parole, no federal court has ever held such a sentence to be constitutionally impermissible. Among the sentences that have been upheld are life imprisonment without parole for

participating in a continuing criminal enterprise involving a marijuana smuggling operation, see *United States* v. *Amend*, 791 F.2d 1120 (4th Cir.), cert. denied, 479 U.S. 930 (1986), or a cocaine distribution operation, see *United States* v. *Martorano*, 866 F.2d 62, 69-70 (3d Cir. 1989), cert. denied, 110 S. Ct. 1128 (1990); *United States* v. *Milburn*, 836 F.2d 419, 421-422 (8th Cir.), cert. denied, 487 U.S. 1222 (1988); *United States* v. *McCann*, 835 F.2d 1184, 1187-1190 (6th Cir. 1987), cert. denied, 486 U.S. 1026 (1988), and for possession of a firearm after repeated armed robberies, see *United States* v. *Gourley*, 835 F.2d 249, 252-253 (10th Cir. 1987), cert. denied, 486 U.S. 1010 (1988). In addition, federal courts have upheld extremely long no-parole sentences that in effect constitute sentences of life imprisonment without parole because of their length. See, *e.g.*, *United States* v. *Whitworth*, 856 F.2d 1268 (9th Cir. 1988) (espionage; no eligibility for parole for 60 years), cert. denied, 109 S. Ct. 1541 (1989); *United States* v. *Berry*, 839 F.2d 1487 (11th Cir. 1988) (series of bank robberies; no parole eligibility for 59 years), cert. denied, 488 U.S. 1040 (1989); *Rothgeb* v. *United States*, 789 F.2d 647 (8th Cir. 1986) (second-degree murder; no parole eligibility for 69 years); *United States* v. *O'Driscoll*, 761 F.2d 589 (10th Cir. 1985) (kidnapping involving a homicide; no parole eligibility for 99 years), cert. denied, 475 U.S. 1020 (1986).

b. Lengthy sentences imposed under state law have also been repeatedly upheld as not grossly disproportionate to the offenses charged, especially where the offense involved the use or threat of violence or trafficking in drugs. For example, the defendant in *Seritt* v. *Alabama*, 731 F.2d 728 (11th Cir.), cert. denied, 469 U.S. 1062 (1984), was sentenced to life imprisonment without parole for armed robbery under an habitual offender statute; he had previously pleaded guilty to four violations

of the State's drug control laws and one count of selling controlled substances. 731 F.2d at 730. In upholding the defendant's sentence, the court took special note of the violent nature of his offense, as well as his previous drug convictions. *Id.* at 732, 734. Other courts have similarly held very stiff sentences to be valid when imposed for a violent crime or one involving drug trafficking.[5]

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[5] See, *e.g.*, *Cocio* v. *Bramlett*, 872 F.2d 889 (9th Cir. 1989) (conviction for reckless driving manslaughter committed under the influence of alcohol while on probation for burglary; life imprisonment with no parole for 25 years); *Terrebonne* v. *Butler*, 848 F.2d 500 (5th Cir. 1988) (en banc) (conviction for selling 22 packets of heroin after having been previously convicted of burglary and theft by fraud; life imprisonment without parole), cert. denied, 109 S. Ct. 1140 (1989); *Tuitt* v. *Fair*, 822 F.2d 166, 180-181 (1st Cir.) ("very serious" crime of armed robbery while masked; life imprisonment under habitual offender statute), cert. denied, 484 U.S. 945 (1987); *Chandler* v. *Jones*, 813 F.2d 773, 778-780 (6th Cir. 1987) (third degree burglary after two other felonies; sentence of life imprisonment); *McLester* v. *Smith*, 802 F.2d 1330, 1333 (11th Cir. 1986) (armed robbery conviction after seven previous non-violent burglaries; sentence of life imprisonment without parole held valid); *Holley* v. *Smith*, 792 F.2d 1046 (11th Cir. 1986) (armed robbery conviction after seven previous grand larceny and burglary convictions; sentence to life imprisonment without parole held valid), cert. denied, 481 U.S. 1020 (1987); *Smith* v. *State*, 529 So. 2d 1022, 1025 (Ala. Crim. App. 1987) (armed robbery conviction after four previous nonviolent offenses; sentence to life imprisonment without parole held valid); *State* v. *Hurley*, 154 Ariz. 124, 133, 741 P.2d 257, 266 (1987) (armed robbery after three previous convictions; sentence to life imprisonment with no parole for 75 years), cert. denied, 484 U.S. 1028 (1988); *State* v. *Waits*, 163 Ariz. 216, 786 P.2d 1067 (Ct. App. 1989) (sale of cocaine while on probation for possessory offense; life imprisonment with no parole for 25 years); *Williams* v. *State*, 539 A.2d 164 (Del.) (life imprisonment without parole for third burglary conviction, cert. denied, 488 U.S. 979 (1988); *State* v. *Guzman*, 520 So. 2d 1099 (Ct. App. 1987) (possession of heroin with intent to distribute; life imprisonment with no parole), cert. denied, 521 So. 2d 1183 (La. 1988); *State* v. *Davis*, 310 Md. 611, 623-639, 530 A.2d 1223, 1229-1237 (1987) (life imprisonment without parole for fourth housebreaking conviction); *State* v. *Bonrud*, 393 N.W.2d 785, 792 (S.D. 1986) (first-degree robbery after three prior terms of imprisonment; 45 years' imprisonment with no parole).

c. The principle that legislatures must be accorded very broad discretion in sentencing matters is underscored by the paucity of cases in which otherwise applicable prison sentences have been held invalid on Eighth Amendment grounds. We have found only three such cases since this Court's decision in *Solem*, and none of them involved serious or violent crimes.

In *Clowers* v. *State*, 522 So. 2d 762 (Miss. 1988), the Mississippi Supreme Court held that a trial court had authority under *Solem* to reduce a mandatory sentence of 15 years without parole under a recidivist statute to five years. The offender in *Clowers* had uttered a forged $250 check and had previously been convicted of burglary/larceny and forgery. In another Mississippi case, *Ashley* v. *State*, 538 So. 2d 1181 (Miss. 1989), the court reached a similar result with respect to an individual sentenced to life imprisonment without parole under a recidivist statute. The offender, who had previously been convicted of a number of burglaries and one attempted robbery, had broken into a house to try to find $4 to pay back a grocer for two cans of sardines he had eaten in the store.

Although the rationale of the other case, *State* v. *Gilham*, 48 Ohio App. 3d 293, 549 N.E.2d 555 (Ct. App. 1988), is unclear, it appears that the court invalidated a sentence of six months' imprisonment for possession of a criminal tool—an automobile—because the crime for which the automobile was used as a tool—prostitution or solicitation—was treated as a low-grade misdemeanor and therefore much less harshly under state law. The sentence apparently was not invalidated because of any judgment

that, standing alone, it would have been grossly disproportionate to the offender's crime.[6]

We do not suggest that these three cases were rightly decided. By their exceptional nature, however, they demonstrate that a remarkable consensus has emerged among both state and federal courts that crimes involving or threatening violence may constitutionally be punished by long prison sentences, up to and including life imprisonment without parole. If this Court were to hold that *Solem* forecloses such a term of imprisonment for a crime of violence such as petitioner's, it would apparently be the first court in the Nation to do so.

3. Petitioner seeks to avoid the force of the unbroken line of authority upholding very long prison sentences for violent and drug-related crimes by claiming that his own offense was not violent. As the premise for his argument, he asserts that "a person who commits nonconsensual, violent crimes is more morally culpable than the petitioner in the instant case." Br. 20. That premise, however, suffers from two serious flaws.

First, petitioner's premise is based on the mistaken assumption that a penal code must assign central importance to the moral culpability of the offender. The Eighth Amendment, however, does not enact a particular penological theory. The federal government and the States are constitutionally free to base their criminal codes on other goals, such as deterrence or rehabilitation. A State that bases its sentencing system on those goals may well depart substantially from a scale of punishments based purely on moral culpability. Nothing in *Solem*—or in any of this

[6] In *Naovarath* v. *State*, 779 P.2d 944 (Nev. 1989), the Nevada Supreme Court relied on both the federal and Nevada constitutions to strike down a sentence of life imprisonment without parole imposed on a 13-year-old boy who killed and then robbed an individual who had repeatedly molested him.

Court's Eighth Amendment cases—imposes the kind of straitjacket on state sentencing procedures that petitioner urges.

Second, the crime of which petitioner was convicted *is*, upon analysis, properly viewed as a violent crime. For instance, a 1985 statistical compilation indicates that 38.4% of those convicted of violent offenses nationwide had a history of drug use. Office of Justice Programs, U.S. Dep't of Justice, *Compendium of Federal Justice Statistics, 1985*, at 36 (July 1990). For the 12 months ending March 31, 1989, 66-75% of all individuals arrested and charged with major criminal offenses in Washington, D.C., tested positive for cocaine. McFarland, *Drug Abuse Indicators Trend Report—Washington, D.C.*, in Community Epidemiology Work Group, U.S. Dep't of Human Services, *Epidemiologic Trends in Drug Abuse* II-266, at II-269 (June 1989). In 1988, of the city's 373 homicides, approximately 60% were attributed to drugs. *Ibid.* And in 1989, 57% of a national sample of males arrested for homicide tested positive for drugs; the comparable statistics for assault, robbery, and weapons crimes were 55%, 73%, and 63%. National Inst. of Justice, *1989 Drug Use Forecasting Annual Report* 9 (June 1990). See generally Goldstein, *Drugs and Violent Crime*, in *Pathways to Criminal Violence* 16, 16-48 (N. Weiner & M. Wolfgang ed. 1989).

Not only is there a direct nexus between drugs and violence, but drug abuse has contributed to enormous physical pain and suffering, as well as death. In Detroit, for example, in the first six months of 1989, a recent survey found that there were 121 deaths in which drugs were a contributing factor—excluding drug-related homicides. National Inst. on Drug Abuse, U.S. Dep't of Health and Human Services, *Data from the Drug Abuse Warning Network, Semiannual Report Trend Data* 41 (1990). Cocaine, the drug involved in this case, was a factor in 47 of

those deaths. *Ibid.* In that same period, there were 4,920 hospital emergency-room episodes in Detroit in which drugs were a contributing factor; cocaine was involved in 2,182 of those episodes. *Id.* at 16.

In adjudicating Eighth Amendment challenges to stiff sentences meted out in drug trafficking cases, courts have recognized that those who distribute drugs are ultimately responsible for the violence that their conduct spawns. In *Terrebonne* v. *Butler*, 848 F.2d 500, 504 (5th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1140 (1989), the court made explicit the comparison between drug offenses and other violent crimes:

> Except in rare cases, the murderer's red hand falls on one victim only, however grim the blow; but the foul hand of the drug dealer blights life after life and, like the vampire of fable, creates others in its owner's evil image—others who create others still, across our land and down our generations, sparing not even the unborn.

See also *United States* v. *Mendenhall*, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (noting public's "compelling interest in detecting those who would traffic in deadly drugs for personal profit"); *United States* v. *Martorano*, 866 F.2d 62, 69 (3d Cir. 1989) (characterizing penalty of life imprisonment without parole as "not harsh" in light of "the havoc that the drug trade wreaks on our nation"), cert. denied, 110 S. Ct. 1128 (1990); *Young* v. *Miller*, 883 F.2d 1276, 1283 (6th Cir. 1989) (crime of possession of a large quantity of heroin is "one of the gravest a person can commit today" because "[t]he ripple effect on society of such a large quantity of heroin is staggering to contemplate"), petition for cert. pending, No. 89-6960; *United States* v. *Ortiz*, 742 F.2d 712, 715 (2d Cir.), cert. denied, 469 U.S. 1075 (1984); *State* v. *Waits*, 163 Ariz. 216, 786 P.2d 1067, 1070 (Ct. App. 1989).

In sum, as the lower federal and state courts have recognized, drug trafficking causes an enormous amount of violence and injury in our society, and it is reasonable to charge drug traffickers with responsibility for that violence. Drug trafficking crimes—including, as here, possession of much larger quantities than could be intended for personal use—therefore readily fall within the general category of serious and violent crimes for which very lengthy prison sentences may properly be imposed.[7]

4. Petitioner and his amici assert that Michigan imposes the harshest penalties of any State for the criminal conduct in which petitioner engaged. Pet. Br. 42-43; ACLU Amicus Br. 18-19; Crim. Def. Att'ys Amicus Br. 25-26. The fact that Michigan alone imposes such a stiff penalty for possession of the particular quantity of drugs with which petitioner was found does not, however, suggest gross disproportionality.

As this Court has noted, "some State will always bear the distinction of treating particular offenders more seriously than any other State." *Rummel* v. *Estelle*, 445 U.S. 263, 282 (1980). That truism merely reflects the diversity of our federal system; it does not render the penalty illegitimate. *Id.* at 281-282. In particular, where the threat posed by criminal conduct is increasing and the law in many jurisdictions is in a state of flux, the fact that one

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[7] Petitioner concedes that he was trafficking in drugs (see Br. 4, 17, 30), and the record fully supports that concession. He was found with a beeper, a number of plastic bags containing small amounts of cocaine, and a coded address book. In addition, he was found with a large quantity (672.5 grams) of pure cocaine; in the words of the laboratory report, "[n]o dilutents were detected." J.A. 3. The purity of the drug supports an inference that petitioner was operating near the top of the drug distribution pyramid and contradicts petitioner's assertion that "[t]he record contains no details to help a reviewing court discern the level of drug trafficking involved." Br. 17.

State has chosen to punish the conduct very severely may simply testify to that State's foresight in identifying and responding to the problem. Legislative responses may lag substantially behind changes in public attitudes and perceptions. It therefore cannot be assumed that the State with the harshest penalties for particular drug-related criminal conduct has departed from an otherwise clear social consensus concerning the severity of the crime.

Because it is only relatively recently that the problem of drug abuse has been recognized as a grave threat to the social fabric of our communities, the statutes governing drug-related crimes have been rapidly evolving in the direction of stiffer sentences and broader application. The major federal criminal drug abuse provisions demonstrate this evolution. For example, the key federal statute prohibiting possession with intent to distribute a controlled substance, 21 U.S.C. 841, has been amended three times in the past ten years, in 1984, 1986, and 1988. Each amendment stiffened the penalties and increased the range of criminal conduct. See 21 U.S.C. 841 note. Similar changes have occurred in federal statutes governing other drug-related crimes, *e.g.*, 21 U.S.C. 844, 845a, 845b, and 848. The Senate has recently enacted legislation that once again increases sentences and broadens the scope of a number of these statutes. See S. 1970, 101st Cong., 1st Sess. (1989), 136 Cong. Rec. S10,192 (daily ed. July 20, 1990). Numerous States have similarly increased the penalties applicable to drug-related crimes.[8]

[8] In just the first six months of 1990, at least six state legislatures enacted statutes to broaden the scope of and increase the penalty provisions for drug-related crimes. Act of Mar. 30, 1990, 1990 Idaho Sess. Laws ch. 268 (Westlaw); Act of Mar. 20, 1990, Pub. L. No. 166-1990, 1990 Ind. Acts, 1990 Ind. Legis. Serv. P.L. 166-1990 (West); Act of Feb. 28, 1990, 1990 N.M. Laws ch. 33 (Westlaw); Act of Feb. 28, 1990, ch. 19, 1990 N.M. Laws ch. 19 (Westlaw); Act of May 18, 1990, ch. 220, 1990 Okla. Sess. Law Serv. 220 (West); Act of Feb. 23, 1990, 1990 S.D. Laws H.B. 1374 (Westlaw); Act of Mar. 28, 1990, ch. 244, 1990 Wash. Legis. Serv. 244 (West).

Beyond that, in arguing that Michigan's penalty scheme stands alone, petitioner defines the applicable categories too narrowly. Because the State's prohibition of possession of amounts of cocaine in excess of 650 grams is obviously not directed at simple possession of drugs for personal use, the Michigan penalty is more analogous to penalties imposed in other jurisdictions for distribution or possession with intent to distribute. Moreover, Michigan's choice of 650 grams of cocaine as the triggering amount for a high-volume drug offense does not render irrelevant other States' statutes that use somewhat higher quantities as the triggering amounts for very long terms of imprisonment. These distinctions, as this Court noted in *Rummel*, "are subtle rather than gross." 445 U.S. at 279. Viewing Michigan's statute as providing for a mandatory term of life imprisonment for possession with intent to distribute a large quantity of a dangerous drug, Michigan's statute is not radically different from the statutes of a number of other States.[9] Thus, even if Michigan's penalty provision is

[9] Although only Alabama has joined Michigan in penalizing large-volume first-offense drug offenders with a mandatory term of life imprisonment without parole (see Ala. Code § 13-A-12-231(2)d (Supp. 1989) (life imprisonment without parole for offense involving more than 10 kilograms of cocaine)), a number of States subject first-time drug offenders to life imprisonment for large-scale drug offenses, and many of those States impose long mandatory minimum sentences. See, *e.g.*, Ark. Stat. Ann. § 5-64-401(a)(1)(i) (1987) (40 years to life); Conn. Gen. Stat. § 21a-278(a) (Supp. 1990) (5 years to life); Fla. Stat. Ann. § 893.135(1)(b)(3) (West Supp. 1990) (15 years to life); Idaho Code § 37-2732(a)(1)(A) (Supp. 1990) (up to life); Mo. Rev. Stat. § 195.222.2(2) (Supp. 1990) (10 years to life); Mont. Code Ann. § 45-9-101(2) (Supp. 1990) (2 years to life); Nev. Rev. Stat. § 453.3385 (1985) (25 years to life); N.Y. Penal Law § 220.21 (McKinney 1989) (15 years to life); N.C. Gen. Stat. § 90-95(h)(3)(c) (1989) (35 years to life);

more severe than the roughly parallel provisions in other States, that disparity does not render Michigan's penalty " 'grossly disproportionate' * * * to the punishment [petitioner] would have received in the other States." *Id.* at 281.

In conducting a disproportionality analysis, the Court in *Solem* also suggested that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction." 463 U.S. at 291. That inquiry appears principally designed to respond to a freakish sentence that may be imposed by a particular sentencing body and is inexplicably at odds with sentences imposed on other, similarly situated defendants in the same jurisdiction. See *Enmund* v. *Florida*, 458 U.S. 782, 795-796 (1982). To draw constitutionally significant conclusions from a comparison of sentences prescribed for different crimes within the same jurisdiction is much more difficult and constitutes a direct judicial challenge to a considered legislative judgment; it is useful, if at all, only in the most extreme cases. See *Weems* v. *United States*, 217 U.S. at 380-381 (penalty for making a false entry in a public document more severe than penalties for misprison of treason, inciting rebellion, conspiracy to destroy the government by force, some degrees of homicide, forgery, and robbery). The intrusiveness of

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N.D. Cent. Code § 19-03.1-23.1(1)c(2)(b) (Supp. 1989) (life imprisonment with no possibility of parole for 30 years); Okla. Stat. Ann. tit. 63, § 2-401B.1 (West 1984) (5 years to life); R.I. Gen. Laws § 21-28-4.01.2(B) (1989) (20 years to life); Tex. Health & Safety Code Ann. § 481.112(d)(3) (Vernon 1990) (15 to 99 years' imprisonment). See also Ga. Code Ann. § 16-13-31(a)(1)(C) and (f) (Supp. 1989) (mandatory minimum of 25 years' imprisonment; maximum of 30 years); La. Rev. Stat. Ann. § 40.967F(1)(c) (West Supp. 1990) (mandatory minimum of 15 years' imprisonment, maximum of 30 years); S.C. Code Ann. § 44-53-370(e)(2)(e) (Law. Co-op. Supp. 1989) (mandatory minimum of 25 years' imprisonment, maximum of 30 years); Tenn. Code Ann. § 39-17-417(j) (Supp. 1990) (15 to 60 years).

court review of legislative judgments as to the gravity of particular crimes and the need for particular punishments highlights the dangers of mechanically invoking *Solem*'s three-part analysis in a setting where, as here, the legislature has clearly expressed the moral judgment of the community as to the gravity of drug trafficking offenses and the punishment that should be meted out for such profoundly anti-social, destructive conduct.

5. Citing this Court's cases involving the need for individualized sentencing determinations in capital cases, petitioner contends that his sentence is constitutionally defective because it was mandated by statute, rather than being imposed by judges from among a range of legislatively authorized possibilities. Pet. Br. 27. This argument is misguided. Not a single case from this Court has required such individualized sentencing in a non-capital case. Cf. *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). Commenting upon the ultimate nature of the judgment made in the capital sentencing process, the plurality opinion in *Woodson* v. *North Carolina*, 428 U.S. 280, 304 (1976), explained that, although the "prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than constitutional imperative," in capital cases "the fundamental respect for humanity underlying the Eighth Amendment" requires that the sentencing authority be permitted to examine the character of the offense and the offender on an individualized basis. The Court has reiterated that principle time and again since *Woodson*. See, *e.g.*, *Sumner* v. *Shuman*, 483 U.S. 66, 74-76 (1987); *Lockett* v. *Ohio*, 438 U.S. 586, 604-605 (1978) (plurality opinion). Petitioner cites no authority to the contrary.

The Court in *Solem* itself took pains to emphasize that it was not questioning the *legislative* judgment underlying the South Dakota sentencing statute at issue in that case.

See 463 U.S. at 299 n.25. The statute set the *maximum* sentence at life imprisonment, and appears to have set no minimum sentence at all. See 463 U.S. at 282. It was the discretionary decision of the sentencing judge to impose the maximum possible sentence that was ruled unconstitutional in *Solem*. For the Court to set aside the sentence in this case would require it to reject not the judgment of a single sentencing judge, but the considered judgment of the Michigan legislature that persons convicted of a large-scale drug offense should be sentenced to life imprisonment without parole. That kind of legislative judgment is one that this Court has properly refrained from disturbing.[10]

Petitioner's contention that individualized sentencing is imperative in a non-capital context is also at odds with the historical roots of the Eighth Amendment. The principles informing the Eighth Amendment were, in part, aimed at checking arbitrary exercises of discretion, not legislative determinations of appropriate punishment for criminal behavior. See *In re Kemmler*, 136 U.S. 436, 446 (1890) (predecessor to Eighth Amendment in English Bill of Rights "had reference to the acts of the executive and judicial departments of the government of England"); *Weems* v. *United States*, 217 U.S. at 402, 409 (White, J., dissenting). Indeed, all of the early antecedents to the Eighth Amendment discussed in *Solem* involved attempts to check judicial or executive overreaching in a system that gave the sentencing authority vast discretion by today's standards.

[10] The only non-capital case in which this Court has struck down a penalty mandated by a legislature under the Cruel and Unusual Punishments Clause is *Weems* v. *United States*, 217 U.S. 349 (1910). In that case, the Court (speaking through a four-Justice majority) held that the Eighth Amendment was violated by the penalty that the Philippines Code mandated for making a false entry in an official record—a minimum of 12 years' imprisonment at "hard and painful labor," with the prisoner shackled throughout that period and subject to various lifetime civil disabilities. In *Rummel* v. *Estelle*, 445 U.S. at 272-274, the Court noted that the judgment in *Weems* appeared to turn at least in part on the extraordinary nature of the "accessories" to the term of imprisonment.

For example, at the time of Magna Carta, the amount of fines—or "amercements" as they were then called—was left almost entirely to the discretion of the authority imposing the fine. See *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2917-2918 (1989); *id.* at 2927 (O'Connor, J., dissenting). Magna Carta's prohibition of excessive amercements, see *Solem*, 463 U.S. at 284, thus imposed a limit on the arbitrary exercise of power and threatened no statute of general application. As late as Blackstone's time, the amount of fines continued to be discretionary, see 4 Blackstone, *Commentaries on the Laws of England* *372 ("Our statute law has not therefore often ascertained the quantity of fines, nor the common law ever; it directing such an offence to be punished by fine, in general, without specifying the certain sum."). Accordingly, the English Bill of Rights included the limitation on "excessive" fines, which later was incorporated almost verbatim in the Eighth Amendment. *Solem*, 463 U.S. at 285 n.10.[11]

The cases *Solem* relied upon as antecedents to the prohibition on cruel and unusual punishment in the English Bill of Rights likewise involved harsh exercises of discretionary judicial authority. *E.g.*, *Hodges* v. *Humkin*, 2 Bulst. 139, 80 Eng. Rep. 1015 (K.B. 1615); *Earl of Devon's Case*, 11 Harg. State Tr. 133, 136 (1689). Moreover, neither of the two specific events that are often said to have crystallized

[11] The extent and nature of the relationship between the Excessive Fines Clause and the Cruel and Unusual Punishments Clause are not at issue in this case. Cf. *Walton* v. *Arizona*, 110 S. Ct. 3047, 3066 (1990) (Scalia, J., concurring).

English sentiment in favor of a prohibition on cruel and unusual punishment involved legislatively mandated punishments; rather, both involved asserted abuses of delegated authority.[12]

The historical record thus suggests that, contrary to petitioner's contention, the Eighth Amendment is particularly directed at the avoidance of arbitrarily harsh assertions of discretionary authority. To be sure, this value does not exhaust the Eighth Amendment's protection. But petitioner's contention—that the replacement of sentencing discretion with determinate, legislatively sanctioned sentences of imprisonment is particularly suspect under the Eighth Amendment—is untenable in light of the historical record. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989) ("the scope of judicial discretion with respect to a sentence is subject to congressional control"); see also *United States* v. *Brittman*, 872 F.2d 827 (8th Cir.), cert. denied, 110 S. Ct. 184 (1989); *United States* v. *Vizcaino*, 870 F.2d 52, 54-56 (2d Cir. 1989); *United States* v. *Frank*, 864 F.2d 992, 1009-1010 (3d Cir. 1988), cert. denied, 109 S. Ct. 2442 (1989).

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[12] As the Court has explained, the provision in the English Bill of Rights has been viewed as "a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the prejury prosecution of Titus Oates in the same year. In either case, the exclusive concern of the English version was the conduct of judges in enforcing the criminal law." *Ingraham* v. *Wright*, 430 U.S. 651, 664-665 (1977). For a detailed explanation of the case of *Trial of Titus Oates*, 10 How. St. Tr. 1079, 1316 (K.B. 1685), in which extremely severe sentences of life imprisonment, whipping, and accessory punishments were imposed in a politically charged case, see Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 856-859 (1969); 1 T. Macaulay, *History of England* 448-453 (1850). For explanations of the "Bloody Assize," see *id.* at 591-612.

CONCLUSION

The judgment of the Court of Appeals of Michigan should be affirmed.

Respectfully submitted.

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